IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

No. 188

SEABOARD SURETY COMPANY,

Petitioner,

vs.

WESTWOOD LAKE, INC., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF OF RESPONDENT AMERICAN CAST IRON PIPE COMPANY

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### THE QUESTIONS PRESENTED FOR REVIEW

The Respondent respectfully submits that the single question as set forth in the Petitioner's Petition for Writ of Certiorari does not accurately present to this Court the issues involved. The Respondent, therefore, restates the questions presented for review as follows:

I

Is an order dismissing a complaint with prejudice as to one defendant because of the plaintiff's failure to

amend the complaint as to said defendant within the time permitted by the Court a final and appealable judgment upon which an appeal must be prosecuted within the time provided by the Rules and not within the scope of Federal Rule of Civil Procedure 54 (b) where the complaint contains a single claim for the identical sum from each defendant and charges the defendants with **several** and not **joint** liability?

II

Where a plaintiff elects (a) not to reduce to final judgment and take an appeal from an order dismissing its complaint as to one defendant with leave to amend, and (b) elects to abandon its claim as to said defendant by failure to amend as to said defendant within the time permitted by the Court, and (c) elects to voluntarily file its amended complaint as to the other defendants, does such plaintiff waive any alleged claim as to said dismissed defendant precluding it from raising any issue concerning the alleged validity of its original complaint on appeal?

## STATEMENT OF THE CASE

The statement of the case as contained in the Petitioner's Petition for Writ of Certiorari contains much material which is not properly before this Court in this proceeding.

The merits of the Petitioner's claim against the Respondents, WESTWOOD LAKE, INC. and the MACKLE CO., INC., is not before this Court for review. After a lengthy trial the District Court entered a judg-

ment adverse to the Petitioner and the same was affirmed by the Court of Appeals.

The merits of the Petitioner's original complaint as the same sought to charge the Respondent, AMERICAN CAST IRON PIPE COMPANY, is not before this Court for review, except to observe that it contained no allegation of facts which would impose any joint liability upon this Respondent and the other Respondents.

The following sequence of events should be set forth for the Court:

On February 4, 1956, the District Court entered its Order denying Motions to Dismiss filed by WESTWOOD LAKE, INC. and the MACKLE CO., INC. and requiring said parties to file an Answer within thirty days, and granting the Motion to Dismiss of AMERICAN CAST IRON PIPE COMPANY with leave to file an Amended Complaint as to this party within ten days. (R. 5-6)

On February 26, 1958, the Petitioner having elected not to file an Amended Complaint as to AMERICAN CAST IRON PIPE COMPANY, the Court entered its Order dismissing the complaint as to AMERICAN CAST IRON PIPE COMPANY with prejudice upon the grounds that there was a failure to plead within the time set in the Court's Order of February 4, 1958. (R. 10-11)

AMERICAN CAST IRON PIPL COMPANY did not obtain from the Court any express determination and direction described in Rule 54 (b) because the complaint did not contain multiple claims but in contrast thereto contained a single claim for the identical sum of money

against different defendants in their alleged **several** and not **joint** liabilities.

On February 27, 1958, the Petitioner filed its Amended Complaint against WESTWOOD LAKE, INC. and the MACKLE CO., INC. only, having voluntarily abandoned its claim as the same allegedly existed against AMERICAN CAST IRON PIPE COMPANY by its election not to appeal from the Court's Order of February 4, 1958, and by its election not to amend as to this defendant by the time permitted by the Court. (R. 6-10)

On September 1, 1959, the District Court entered a judgment adverse to the Petitioner and in favor of WESTWOOD LAKE, INC. and the MACKLE CO., INC. (R. 333-334)

On September 24, 1959, the Petitioner gave Notice of Appeal from the judgment of September 1, 1959, and from the Order of February 26, 1958. (R. 337-338)

On April 18, 1960, the Circuit Court of Appeals, Fifth Circuit, dismissed the appeal from the Order of February 26, 1958. (Petitioner's App. 7-8)

## ARGUMENT

No grounds are stated in the Petition for Certiorari for the granting by the Court of this discretionary writ.

The Petitioner cites no conflicting decisions of other Courts of Appeals and cites no conflicting prior decisions of the Court of Appeals, Fifth Circuit.

The Petitioner cites no conflicting decisions of this Court.

The Petitioner has wholly failed to demonstrate that the Court of Appeals has departed from the accepted and usual course of judicial proceedings such as to call for this Court's power of supervision.

The Petitioner has failed to cite the decisions of other Courts of Appeals which are not only not in conflict with this decision of the Court of Appeals, Fifth Circuit, but are in direct conformity with the same.

The decision of this Court and the decision of the Court of Appeals cited by the Petitioner hold that in cases involving **multiple claims** a decision as to less than all of the claims is not final and appealable without compliance with Rule 54 (b). **Sears, Roebuck & Co. v. MacKey**, 351 U. S. 427, 100 L. ed. 1297, 76 S. Ct. 895 (1956); **Shipley v. Leonard Marcus Co.**, 214 F. (2d) 493 (1954 C.A. 3).

The decisions of all the Courts of Appeals including the Fifth Circuit hold that the dismissal of one defendant in a multiple party action is interlocutory and non-appealable prior to final judgment as to the remaining defendants where the liability of all defendants is **joint** rather than **several**. **Meadows v. Greyhound Corp.** 235 F. (2d) 233 (1956 C.A. 5); **Dunaway v. Standard Oil Co.**, 178 F. (2d) 884 (1949 C.A. 5); **Tauzin v. St. Paul Mercury Indemnity Co.**, 195 F. (2d) 223 (1952 C.A. 5); **Reagan v. Traders & General Insurance Company**, 255 F. (2d) 815 (1958 C.A. 5); **Ricard v. Smith**, 276 F. (2d) 652 (1960 C.A. 5); **Garbose v. George A. Giles Co.**, 183 F. (2d) 513

(1950 C.A. 1); **District 65 etc. v. McKague,** 216 F. (2d) 153 (1954 C.A. 3); **Brondt v. Renfield Importers, Inc.,** 216 F. (2d) 206 (1954 C.A. 8).

The Petitioner contends that the above cited cases of the Court of Appeals, Fifth Circuit, and of the Courts of Appeals of other circuits are in conflict with the decision of the Court of Appeals in this cause.

The Petioner also cites the cases of **Feiler v. D. Loughran,** 188 F. (2d) 623 (1951 C.A.D.C.); **Roberts v. American Newspaper Guild,** 188 F. (2d) 650 (1951 C.A.D.C.); **Tobin Packing Co. v. North American Car Corp.** 188 F. (2d) 158 (1951 C.A. 2); **Drown v. United States Pharmacopoeial Convention,** 198 F. (2d) 470 (1952 C.A. 9). These cited cases involve multiple parties and in each case an appeal from a decision with regard to less than all of the parties was dismissed where there was no compliance with Rule 54 (b). The opinions contain no discussion concerning the precise grounds for the decisions and contain no discussion as to whether the cases involve multiple claims or whether the liability of the defendants was joint or several. Therefore, it cannot be said that the decision of the Court of Appeals, Fifth Circuit, is in conflict with any of these cited cases.

Federal Rule of Civil Procedure 54 (b) has no application whatever to a suit which involves only **multiple parties** and not **multiple claims.** The Rule is only applicable where there are **multiple claims.** The dismissal of less than all defendants where there are multiple defendants **jointly** liable is not a final judgment and appealable although Rule 54 (b) is not applicable to these cases. The dismissal of less than all defendants in a multiple

party action where the defendants are liable **severally** and not **jointly** is a final and appealable judgment although Rule 54 (b) is not applicable to these cases. The instant case falls within this last group.

There is ample authority to support the decision of the Court of Appeals, Fifth Circuit, and these authorities are not in conflict with the decisions of any Court of Appeals or with any decision of this Court.

A case which is analogous to the instant case is the case of **Higgins v. Shenango Pottery Company et al.**, 256 F. (2d) 504 (1958 C.A. 3). This case was a stockholder's derivative action against a corporation, certain officers thereof, and other individual defendants, to recover damages for alleged diversion of corporate business to a partnership consisting of the officers and the other individual defendants. A Judgment of Dismissal was entered as to those individual defendants who were not officers of the corporation and the plaintiff appealed from this order. The Court of Appeals, Third Circuit, held that this order was final and appealable and that Rule 54 (b) of the Federal Rules of Civil Procedure was not relevant. The plaintiff was suing upon one single claim as to which the defendants were **severally** and not **jointly** liable. In the Opinion, the Court stated:

> "(5) Rule 54 (b) of the Federal Rules of Civil Procedure, 28 U.S.C. is not relevant to this appeal. By its terms its application is to 'multiple claims.' As pointed out in Sears, Roebuck & Co. v. Mackey, 1956, 351 U.S. 427, 76 S. Ct. 895, 899, 100 L. Ed. 1297: 'The amended rule does not apply to a single claim'."

"* * * (T)here is no doctrine that finalty is lacking in an order simply and solely because it dismisses less than all the parties. Where 'jointness', in some form, is absent, the test in multiple party cases is whether the order terminates the suit 'as a severable matter' or a 'distinct matter,' with respect to the party dismissed."

The following cases stand for the same proposition as to which there is no conflicting authority: **General Time Corp. v. Padua Alarm Systems, Inc. et al.**, 199 F. (2d) 351 (1952 C.A. 2); **Siegmund v. General Commodities Corporation, Limited.**, 175 F. (2d) 952 (1949 C.A. 9).

The Petitioner ignores the second question presented for review; namely, the Petitioner's abandonment and waiver of its alleged claim against the AMERICAN CAST IRON PIPE COMPANY.

Where a plaintiff files an **amended complaint**, the sufficiency of the **original complaint** is not subject to review upon appeal where the entire proceedings have been predicated upon the allegations of the **amended complaint**, the sufficiency of the **original complaint** having become moot.

In the case of **MacKay v. Loew's Inc.**, 182 F. (2d) 170, (1950 C.A. 9) cert.den. 340 U.S. 828, 95 L. Ed. 608, 71 S. Ct. 65, reh. den. 340 U.S. 885, 95 L. Ed. 643, 71 S. Ct. 194, the Court refused to review original complaints where amended complaints had been filed. The Court of Appeals, Fifth Circuit, relied upon and cited this case in rendering its decision which the Petitioner seeks to have this Court review. (Petitioner's App. A 7)

The Petitioner did elect to file an amended complaint and a second amended complaint and elected not to name the AMERICAN CAST IRON PIPE COMPANY as a party defendant therein. The amended complaint and the second amended complaint contain allegations as to which there is no indication or suggestion in the original complaint.

The Petitioner could have exercised its election to omit the AMERICAN CAST IRON PIPE COMPANY as a party defendant and proceed upon its amended pleadings against the other defendants in two ways: (1) By filing an amended complaint **within** the time amendment was permitted as to the AMERICAN CAST IRON PIPE COMPANY, and voluntarily failing to name the AMERICAN CAST IRON PIPE COMPANY as a party defendant in the amended complaint, or (2) by voluntarily delaying the filing of its amended complaint **beyond** the time amendment was permitted as to the AMERICAN CAST IRON PIPE COMPANY and thus voluntarily failing to name the AMERICAN CAST IRON PIPE COMPANY as a party defendant in the amended complaint. The second alternative was as free and voluntary as the first.

The Petitioner could have filed a timely appeal from the Order of the District Court dismissing its complaint as to AMERICAN CAST IRON PIPE COMPANY and the matter could have been adjudicated. The Petitioner by failing to take a timely appeal now seeks to obtain a second opportunity to try its case having failed to prevail against the Respondents, WESTWOOD LAKE, INC. and the MACKLE CO., INC.

The cases of **Higgins v. Shenango Pottery Company et al.**, supra, **General Time Corp. v. Padua Alarms Sys-**

tems, Inc. et al., supra, **Siegmund v. General Commodities Corporation, Limited,** supra, are not in conflict with any decision of any Court of Appeals or of this Court. The Court of Appeals, Fifth Circuit, relied upon and cited these three cases in rendering its decision which the Petitioner seeks to have this Court review. (Petitioner's App. A 7)

The terms "claims" and "parties" are legal words of art well understood by lawyers and judges. **Meadows v. The Greyhound Corporation,** supra. Attorneys, such as those for the Respondent, AMERICAN CAST IRON PIPE COMPANY, should be permitted to rely upon the distinction and should not be required to obtain a determination and direction pursuant to Rule 54 (b) where the Rule is not applicable.

Where there are no conflicting decisions, this Court should not exercise its discretion in granting the discretionary Writ of Certiorari in order to change Rule 54 (b) by judicial interpretation.

It is respectfully submitted that no grounds for the granting of the Writ of Certiorari are set forth in the Petition and that the Writ of Certiorari should be denied.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of the Respondent AMERICAN CAST IRON PIPE COMPANY was mailed to JAMES A. DIXON, Attorney for the Petitioner, Dade Federal Building, Miami 32, Florida, and WILLIAMS & SALOMON, Attorneys for the Respondents WESTWOOD LAKE, INC. and the MACKLE CO., INC., 1003 duPont Building, Miami, Florida, this 26th day of July, 1960.

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